

Van Can Company and United Steelworkers of America, Local No. 5632, AFL-CIO-CLC.
Case 31-CA-18306

September 26, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On April 5, 1991, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Van Can Company, Fontana, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by not providing the Union with an opportunity to be present at the adjustment of the grievance regarding employee Thomas Seymour's discharge, we find that the Respondent and Seymour reached a final settlement agreement during their telephone conversation which occurred either on March 18 or 19, 1991. In that telephone conversation, the Respondent's plant manager, Lundy, informed Seymour that he could be reinstated if Seymour agreed to certain stipulations, Lundy summarized those stipulations, and Seymour agreed. The finding that the Respondent and Lundy reached a final agreement during that telephone conversation is also evidenced by the fact that the Respondent paid Seymour for the week beginning March 19, even though Seymour did not actually return to work until March 26.

Moreover, we find that the Respondent violated the Act by engaging in the March 18 or 19 telephone conversation even if a final adjustment was not reached. A union has a right to be present at a meeting at which a final adjustment is proffered, irrespective of whether a final adjustment is actually reached at the meeting. See *Postal Service*, 281 NLRB 1015, 1018 fn. 14 (1986). In the instant case, the Respondent made an offer of final adjustment in the telephone discussion of March 18 or 19. The Union was given no opportunity to be present at this discussion. Accordingly, even if a final adjustment was not reached in that discussion, the Respondent's conduct was unlawful.

In finding a violation herein, Member Raudabaugh further relies on the fact that the Respondent and Seymour reached an agreement at a time when the Union had a grievance pending on Seymour's behalf.

Raymond M. Norton, Esq., for the General Counsel.
James N. Foster, Esq., of St. Louis, Missouri, for the Respondent.
H. Tim Hoffman, Esq., of Oakland, California, for the Charging Party.

304 NLRB No. 134

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. I heard this matter in San Bernardino, California, on November 28, 1990. The complaint, based on a charge filed by United Steelworkers of America, Local No. 5632, AFL-CIO-CLC (Union)¹ alleges that Van Can Company (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) in March 1990 by adjusting a grievance with bargaining unit employee Thomas Seymour without giving the Union opportunity to be present.

I. JURISDICTION

Respondent produces cans at a plant in Fontana, California. The complaint alleges, the answer admits, and I find that it is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The pleadings also establish and I find that the Union is a labor organization within Section 2(5) of the Act.

III. THE ALLEGED MISCONDUCT

A. Facts

The Union has represented the production and maintenance employees at Respondent's Fontana plant since being certified, following an NLRB-conducted election in 1975.² Those employees are covered by a collective-bargaining agreement effective from February 15, 1989, through February 14, 1992. The agreement contains a grievance/arbitration procedure.

On September 11, 1989, Respondent discharged Seymour and a coworker, Kenneth Bowling, following an altercation between the two.³ On September 15, the Union filed separate grievances alleging that the two had been "unjustly discharged" and demanding that they "be returned to work and made whole."⁴ Respondent answered by letter dated September 19, reaffirming its actions. The Union rejoined by letter dated October 20, invoking the arbitration procedure.

An arbitration hearing in the Bowling matter took place on March 17, 1990. A date for the Seymour hearing before a different arbitrator was yet to be set.

On March 16, Respondent's plant manager, Bill Lundy, served Seymour with a subpoena to testify in the Bowling hearing. Seizing the opportunity, Seymour told Lundy that he "would do whatever [he] could to get [his] job back," that he would "sign anything," and that he "felt" he did not "need" the Union because it was not "doing anything" for

¹ The charge was filed on June 8, 1990.

² The formal unit description is:

All production and maintenance employees employed at Respondent's premises at 10837 Etiwanda Avenue, Fontana, California, excluding office clerical employees, professional employees, guards, supervisors as defined in the Act, and all other employees.

The parties have stipulated and I find that this is an appropriate unit for purposes of the Act.

³ Bowling was a vice president of the Union and its grievance committeeman at the plant.

⁴ Seymour's grievance was cosigned by him and Reed Hogate, the Union's president.

him. Lundy responded that he would "get in touch with" the corporate office in St. Louis and that "they have to make the final decision."

The next day, while waiting to testify, Seymour was approached by the Union's president, Reed Hogate, who asked if Respondent had offered him a job. Seymour testified that he replied in the negative. Hogate said that Seymour "indicated" he was "under the impression" he would be reinstated without backpay. Regardless, Seymour told Hogate, more or less, about his March 16 exchange with Lundy, and Hogate responded that he would "get back to" Seymour in the event of "new developments."

Also on March 17, Hogate suggested to Lundy and Respondent's attorney, James Foster, that the "best way" to resolve the Bowling and Seymour grievances would be to "do a last-chance agreement on both of them and do away with the arbitration." Foster replied that Respondent was "considering" that for Seymour, "but that Bowling's was going to stand in arbitration." Hogate answered, "You do what you have to do, and we will do what we have to do."

A day or two later, by telephone, Lundy informed Seymour that he could have his job back, with "certain stipulations." Lundy summarized those stipulations, and Seymour agreed.

On March 22, Lundy gave Seymour a memorandum stating that in exchange for the withdrawal of his grievance Respondent would convert his discharge to a suspension, would reinstate him effective March 19, 1990, and would pay him 5 days' pay for the week ending March 24. The memorandum was accompanied by a settlement and release, as it was styled, a so-called "Last-Chance Acknowledgement," and a "letter" attached to the Last-Chance Acknowledgement. Lundy sent copies of these materials to Robert Tinker, a staff representative for the Union, with whom Respondent had dealt concerning arrangements for the Seymour arbitration, and to Tim Moran, the Union's grievance committeeman in the plant since Bowling's discharge. Seymour returned to work on March 26.

On March 28, in Lundy's office, Seymour signed the settlement and release, the Last-Chance Acknowledgement, and the letter attached. Moran, present at Lundy's behest, told Seymour, "If you want to go back to work, sign them, but I ain't signing them."

For all its multipaged prolixity, the settlement and release states in essence that Seymour released Respondent "from any and all claims . . . as a consequence of" his suspension and withdrew "any grievances now pending" in exchange for \$424.⁵ The Last-Chance Acknowledgement states variously that, while Respondent had agreed "to convert [the] discharge for cause to a suspension," the "severity of this suspension cannot be overstated"; that Seymour was being given "only one last chance"; that he would "be discharged without further notice" should he thereafter "engage in . . .

any other violation of the Employer's standards of conduct, and/or . . . any other form of misconduct"; and that he would "follow the guidelines set forth in the attached letter." The letter extracted a "promise" from Seymour to "improve communications within the workplace" by such measures as "refrain[ing] from the use of any foul words," "avoid[ing] . . . terms which refer to the ethnic origin of employees," "avoid[ing] all off-color or offensive remarks," etc.

Hogate went to the plant on March 29, where he mentioned to Lundy that he had heard about Seymour's reinstatement and asked about his "status." Lundy told him about Respondent's underlying agreement with Seymour; and Hogate asked for and received copies of the documents Seymour had signed. Hogate testified that he also asked, "Why wasn't the Union involved?" and Lundy said he "didn't know."

By letter dated March 30, the arbitrator chosen for the Seymour matter informed the parties that since they had been unable to agree on a hearing date, he was setting the hearing for June 20. Respondent's attorney, Foster, advised the arbitrator by letter of April 2 that "the Union ha[d] withdrawn the grievance," that "the matter ha[d] been resolved," and that the need for a hearing consequently no longer existed. Foster routed a copy of this letter to the Union's Tinker.

On June 8, as earlier noted, the Union filed its charge. The charge alleges that Respondent violated Section 8(a)(5) by "negotiating directly with . . . Seymour for a last chance agreement and entering into an unlawful last chance agreement without the involvement or consent of the [Union]."

The arbitrator wrote the parties on June 11 that while Respondent had represented that Seymour had "returned to work and dropped his grievance," the Union was contending that "the grievant does not have the authority to drop the grievance, only the Union does." The arbitrator's letter continued that he was canceling the June 20 hearing and wanted the parties to "submit documentary evidence and written argument in support of" their positions by June 20.

Donald Fuller, for the Union, wrote the arbitrator on June 18, enclosing a copy of the unfair labor practice charge⁶ and stating in part:

As of this date there has been no contact made by the Company to the Union, either by phone or in writing, that they would try to settle the grievance.

The Union's position is that the grievance is still in the procedure. We have not been a party to any settlement agreement, if so it would have been signed by this Union.

The Union is requesting that the arbitration be rescheduled on this matter.

Foster "advised" the arbitrator by letter dated June 26, that he "no longer ha[d] any authority" in the matter because the grievance had been "completely withdrawn" and because the Union's charge had conferred preemptive authority on the NLRB to "investigate and resolve the matter." Foster's letter added that Seymour had requested that he be "returned to work without backpay, without any further

⁵The \$424 represented 5 days' pay. Asked why Seymour was paid "for the week that he didn't work," Lundy testified: "Because the proposed agreement was that I would return him to work as soon as possible that following week, which would have been the 19th, I believe . . . I didn't make it. . . . I didn't get the letter from St. Louis until . . . the 22nd. So . . . whatever days were gone that week had already been missed, due to scheduling purposes. And I wanted to bring him on on the day shift . . . I [therefore] waited until the following week so I could schedule him in, but due to me saying that I would pay him from the time that the agreement was made, that is the reason I paid him that way."

⁶The letter is in evidence as G.C. Exh. 15. I grant Respondent's motion to correct record to make the charge, which was attached to the letter as sent, a part of that exhibit.

waiting for the Union,” and noted that Section 9(a) of the Act contains a proviso giving any employee or group of employees “the right . . . to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative.” Foster’s letter closed that, whereas Respondent sent the Union a copy of Lundy’s March 22 memorandum, together with the other documents proffered to Seymour, nothing thereafter “was received from the Union objecting to the terms of the withdrawal of the grievance as submitted by the employee.” The arbitrator informed the parties, by letter of July 18:

I find that the NLRB has exclusive jurisdiction over this ULP at this time. I, therefore, find that the Seymour grievance has been resolved and withdrawn and further find that I no longer have any authority in the Seymour grievance.

B. Conclusion

As Respondent’s attorney stated in his June 26 letter to the arbitrator, Section 9(a) of the Act contains a proviso giving any employee or group of employees “the right . . . to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative.”

Counsel neglected, however, to acknowledge a second proviso, which states: “*Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.”

I conclude, in agreement with the General Counsel, that Respondent adjusted Seymour’s grievance in derogation of the Union’s second-proviso rights, thus violating Section 8(a)(5) and (1).

I see nothing wrong in Lundy’s initial March 16 conversation with Seymour about reinstatement. Seymour apparently opened the subject, and the record contains no convincing evidence that the exchange evolved into a discussion of substantive adjustment terms. I am persuaded, though, that Lundy’s followup communications with Seymour—starting with the telephone conversation 2 or 3 days later in which he set forth and Seymour consented to certain conditions of reinstatement, continuing with his March 22 proffer to Seymour of the attendant documents, and concluding with the March 28 document signings—failed to satisfy the second proviso. *Blast Soccer Associates*, 289 NLRB 84 (1988); *Postal Service*, 281 NLRB 1015 (1986); *Top Mfg. Co.*, 249 NLRB 424 (1980).

True, the Union’s grievance committeeman, Moran, attended the March 28 meeting, but that did not save it from being an extension of the prior illegality, much less cure the earlier offenses. True, too, the Union knew as early as March 17 that something was brewing, from both Seymour’s and Attorney Foster’s disclosures to Hogate, and it received proof positive from the documents Respondent sent it on about March 22. The Union’s ensuing response, or lack thereof, did not amount to the requisite “clear and unequivocal” waiver of its second-proviso rights, however. *Blast Soccer Associates*, supra at 88; *Top Mfg. Co.*, supra at 425–426.

REMEDY

Having concluded that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease

and desist therefrom and to take certain affirmative action to effectuate the purposes of the Act.

Although the Board customarily directs an employer to restore the status quo ante if it has taken unilateral action to an employee’s detriment, I cannot be certain that Respondent’s grievance adjustment visited detriment on Seymour. I therefore shall recommend that Respondent be ordered to restore the status quo ante by setting aside the unilateral grievance adjustment only if the Union elects, with Seymour’s concurrence, to have that done.⁷

CONCLUSION OF LAW

Respondent violated Section 8(a)(5) and (1) of the Act in March 1990 by adjusting the grievance of a bargaining unit employee, Thomas Seymour, without giving his union, United Steelworkers of America, Local No. 5632, AFL–CIO–CLC, opportunity to be present.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Van Can Company, Fontana, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Adjusting the grievances of bargaining unit employees without giving their union, United Steelworkers of America, Local No. 5632, AFL–CIO–CLC an opportunity to be present.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, with the concurrence of Thomas Seymour, set aside the March 1990 unilateral adjustment of the grievance arising from Respondent’s prior discharge of him.

(b) Post at its place of business in Fontana, California, copies of the attached notice marked “Appendix.”⁹ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this recommended Order what steps Respondent has taken to comply.

⁷ *Blast Soccer Associates*, supra.

⁸ Any outstanding motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT adjust the grievances of our bargaining unit employees without giving their union, United Steelworkers of

America, Local No. 5632, AFL-CIO-CLC, an opportunity to be present.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request of the Union, with the concurrence of Thomas Seymour, set aside the March 1990 unilateral adjustment of the grievance arising from our prior discharge of him.

VAN CAN COMPANY